Tinius Olsen Testing Machine Company *and* Teamsters Local Union No. 115 a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner *and* Machine Tool & Die Local 155 of the United Electrical Radio & Machine Workers of America, Intervenor. Case 4–RC–19586

September 30, 1999

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held January 13, 1999,[1] and the hearing officer's report recommending disposition of it [pertinent portions appear an appendix]. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for the Petitioner and 23 for the Intervenor. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to affirm the hearing officer's findings and conclusions only to the extent consistent with this Decision.

The Petitioner's Objection 5 alleges that on the morning of the election the Employer distributed employee paychecks containing raises retroactive to December 21, 1998, in an attempt to sway the election. The Petitioner alleges that this conduct violated the Board's rule set out in *Kalin Construction Co.,* 321 NLRB 649 (1996). In *Kalin*, the Board adopted a "strict rule against changes in the paycheck process for the purpose of influencing the employees' votes in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." Id. at 652. The Board defined the term "paycheck process" to encompass the following four elements:

> The paycheck itself
> The time of the paycheck distribution
> The location of the paycheck distribution
> The method of the paycheck distribution.

The Board in *Kalin* further held that "if a change in the paycheck process is motivated by a legitimate business reason unrelated to the election, the rule would not be violated." Id.

In the instant case, the hearing officer found that no changes were made to the time, location, or method of paycheck distribution. She found, however, that the inclusion of the 3-percent across-the-board increase and the retroactive pay from December 21, 1998, constituted a change to the paycheck itself on the day of the election.

In its exceptions, the Employer contends that no change to the paycheck was made. Moreover, both the Employer and the Intervenor argue that, even if the granting of retroactive pay were to be considered a change in the paycheck, the Employer was required to make that change pursuant to a negotiated collective-bargaining agreement ratified on about January 7. The Employer asserts that it had a contractual obligation and therefore a legitimate business reason to grant the increase in the next available paycheck, which was due on the day of the election. We find merit in these exceptions.

In mid-November 1998, shortly after the bargaining unit employees began discussions with the Petitioner, the Employer began negotiations with the Intervenor (the incumbent bargaining representative) for a successor contract to the existing bargaining agreement that was set to expire on February 10. On November 19, 1998, the Petitioner filed an election petition. On December 17, 1998, the Employer and the Intervenor arrived at a tentative agreement that was not ratified by the bargaining unit employees. Negotiations continued and culminated in a new tentative agreement that was ratified on about January 7. Both agreements provided for a 3-percent wage increase that was retroactive to December 21, 1998. The other terms of the agreement became effective on February 11. Both the increase in the wage rate and the retroactive pay appeared on the first scheduled paycheck after ratification, which was distributed to employees on January 13, the day of the election.

The Petitioner concedes that, notwithstanding the pendency of the instant petition, the Employer was obliged to negotiate with the Intervenor under *RCA Del Caribe, Inc*., 262 NLRB 963 (1982). The Petitioner does not specifically object to the inclusion in the January 13 paycheck of the wage increase for the period following contract execution. Nor does the Petitioner object to the right of the Employer and the Intervenor to negotiate a retroactive increase. The Petitioner, relying on *Kalin*, objects solely to the inclusion of the retroactive pay in the January 13 paycheck.[2]

It is not clear that the inclusion of the retroactive pay in this proceeding constitutes a change in employees' paychecks within the meaning of *Kalin,* which addressed the paycheck *process* rather than the actual pay distributed to employees. However, even viewing the inclusion of the retroactive pay as a change encompassed by *Kalin*, we find that the Employer has satisfied its burden to establish a legitimate business reason for making the change. The record establishes that the collective-

[1] All dates are 1999 unless otherwise indicated.

[2] The Petitioner does not assert that the retroactive pay was objectionable as a grant of benefit during the critical period. In its answering brief the Petitioner contends that the Employer could have issued the retroactive pay in a separate paycheck "on the day before the election or for that matter even after the election was concluded." Because the objection was litigated only in terms of *Kalin*, and in view of the Petitioner's concession, we have examined the objection strictly within the context of *Kalin*.

bargaining agreement providing for the retroactive increase was ratified by employees on about January 7. In granting the wage increase with retroactive pay in the next regular paycheck, the Employer honored its collective-bargaining agreement with the Intervenor and respected the rule set out in *RCA Del Caribe*, supra. Therefore we overrule Objection 5.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Machine Tool & Die Local 155 of the United Electrical Radio & Machine Workers of America and that it is the exclusive representative of these bargaining unit employees.

> All production and maintenance employees at the Employer's facility at Easton Road, Willow Grove, Pennsylvania, excluding salaried foreman, office clerical employees, the shipper, the receiver, the storekeeper, the pattern keeper, salaried machine checkers, salaried repairmen, testing laboratory employees, draftsmen, professional employees, guards, watchmen, and supervisors as defined in the Act.

MEMBER HURTGEN, concurring.

My colleagues have reversed the hearing officer and found that the Employer did not interfere with the election by including in the employees' election day paycheck a previously negotiated retroactive wage increase. The majority finds that is not clear that this increase constitutes a change in employees' paychecks within the meaning of *Kalin Construction Co*., 321 NLRB 649 (1996). They further find that, to the extent the increase is governed by *Kalin*, the Employer satisfied its burden of showing that election day payment of the increase was for a legitimate business reason unrelated to the election. Although I agree with the majority's holding, I do not adopt their *Kalin* analysis.

As I stated in my dissent in *United Cerebral Palsy Assn. of Niagara County,* 327 NLRB 40 (1998), I do not subscribe to the holding in *Kalin* that any of four enumerated changes in the payroll process within 24 hours of the election is per se objectionable, absent an employer justification for the action which is unrelated to the election.[1] Rather, instead of presuming per se employer misconduct (and placing the consequent burden on the employer of disproving an objectionable act), I would consider all of the facts and circumstances surrounding an employer's changes to the paycheck process shortly before an election. Such factors would include, but are not limited to, employer motive, justification, and the circumstances of the change. Having considered all of the relevant factors, I find that the Employer's election-day grant of a wage increase did not interfere with the election.

First, by continuing to negotiate a successor collective-bargaining agreement with the Intervenor following the Petitioner's filing of the instant election petition, the Employer was simply comporting with its obligations under *RCA Del Caribe, Inc.*[2] As a result of those negotiations, an agreement was reached and ratified by unit employees about January 5, 1999, providing for, among other things, a wage increase retroactive to December 21, 1998. There is no evidence or claim that the negotiated increase or its retroactivity was objectionable. Nor would I find, in the absence of a specific agreement that the retroactive increase would be paid at some other time, that it was improper for the Employer to include it in the employees' next regular paycheck. Indeed, absent an agreement to the contrary, I find that this was the appropriate date on which that retroactive increase should have been paid. Finally, there is no evidence that the Employer, in any manner, sought to link the increase to the election or to its views regarding representation. Accordingly, under all of these circumstances, I find that nothing in the election day payment of the retroactive increase interfered with the election. Indeed, in my view, it is a situations like this—where the complained of conduct is totally divorced from the election process—which point up the deficiency in the *Kalin* per se test.

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION

The remaining objection (Objection 5) alleges that the Employer violated the rule set forth in *Kalin*, by distributing employee checks containing raises retroactive to December 21, 1998, on the morning of the election.

The only witness called to testify at the hearing was Robert J. Taylor, who was called by the Petitioner. Taylor testified that he has worked for the Employer for 18 years. Taylor also testified that his collective-bargaining representative is the Intervenor. Employer and the Intervenor had a contract in effect from February 10, 1996, through February 10, 1999.[3] The record does not indicate how long the Intervenor has represented the Employer's employees. Taylor testified that in early October 1998, he contacted the Petitioner and that as a result of his contact, the Petitioner initiated an organizing campaign amongst the Employer's employees. Taylor also testified that the Intervenor had surveyed the bargaining unit employees and determined that it wished to conclude the negotiations for a successor contract before the Christmas holidays. On December 17, 1998, the Employer and the Intervenor arrived at a tentative agreement, which was introduced into evidence as E-1.

[1] Were I to subscribe to the *Kalin* test, I would agree with my colleagues that the Employer's conduct was not objectionable.

[2] 262 NLRB 963, 965 (1982). ("[T]he mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union.")

[3] Taylor testified that the current contract was effective from February 10, 1996, through February 1999. However, none of the parties entered the current contract into evidence. I have concluded that the current contract's expiration date was February 10, 1999, because the successor contract negotiated by the parties is effective from February 11, 1999, to February 10, 2002. (See P-1 and E-1.)

On December 17 or 18, 1998, a contract ratification vote was conducted amongst the unit employees at the Employer's facility and as a result, the bargaining unit employees rejected the contract. This tentative agreement provided for a wage increase of 3 percent during the first contract year retroactive to December 21, 1998, and a 2-1/2-percent increase in the second and third contract years. The wage increases for the second and third years were to be effective on February 11 of each year. A second ratification vote was conducted sometime around January 7, 1999. The bargaining unit employees voted in favor of ratification on this occasion. The tentative agreement entitled "January 5, 1999 Memorandum of Understanding" again provided for a 3-percent increase for bargaining unit employees which was made retroactive to December 21, 1998. The remaining contractual benefits, including wage increases for the second and third years of the contract, were effective on February 11, 1999, the effective date of the successor contract.

The election in this matter was conducted on January 13, 1999, a payday. Taylor testified that on January 13, 1999, he received his paycheck from his supervisor at his work station at about 8:30 a.m. and that he always received his pay check from his supervisor at his work station. Taylor further testified that he received $43.50 labeled "misc" on his paycheck. According to Taylor, this $43.50 represented the pay increase which had been negotiated by the Employer and the Intervenor and which was made retroactive to December 21, 1998.

In *Kalin Construction Co., Inc*., 321 NLRB 649 (1996), the Board adopted a strict rule against changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during the period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the pools [sic]. See *Kalin*, supra at 650. The Board stated that the "paycheck process" encompassed four elements: (1) the paycheck itself; (2) the time of paycheck distribution; (3) the location of paycheck distribution; and (4) the method of paycheck distribution. See *Kalin*, supra at 652. The Board held that a change in any of the four elements during this 24-hour period would be grounds for setting aside the election upon the filing of objections, absent a showing the change was motivated by a legitimate business reason unrelated to the election. See *Kalin,* supra at 652. Under *Kalin*, the burden is upon the Union (in the instant case upon the Petitioner) to show that a change in the paycheck process occurred during the proscribed period. If that burden is satisfied, and if the employer fails to establish a legitimate business reason for the timing of the change, an adverse inference will be drawn that the employer's motive was to influence the employees' vote in the election. See *Kalin,* supra at 652 fn. 11.

The Petitioner concedes that there was no change in the time, location or method of the paycheck distribution in the instant case. The Petitioner takes the position, however, that the Employer changed the paycheck itself, by including the pay increase, and that the change in the paycheck is barred by *Kalin*.

The Employer concedes that bargaining unit employees received a pay increase retroactive to December 21, 1998, in their checks on January 13, 1999, the day of the election. The employer takes the position that the pay increase was not related to any attempt by it to influence employees' votes in the election because it had negotiated the change with the Intervenor and that at the time it negotiated the raise, it did not know when the election would take place because the Stipulated Election Agreement was not approved until December 21, 1998. The Employer also takes the position that the change in the paycheck did not occur during the proscribed period. In support of its position, the Employer points out that the pay increase was negotiated and agreed to by it and the Intervenor during December 1998 and that it was actually implemented on January 7, 1999, a full 6 days before the election.[4] The Employer argues that if in fact a change occurred, it had a legitimate business reason for the timing of the change because it was meeting its.bargaining obligation under *RCA Del Caribe, Inc*, 262 NLRB 963 (1982). The Employer asserts that the first day that it could pay the retroactive increase was coincidentally on the day of the election and that if it had not given the wage increase it would have violated the January 5, 1999 Memorandum of Understanding.

The Intervenor, in its posthearing brief, concedes that there was a change in the paycheck itself, but argues that this was not the type of change contemplated by *Kalin* because the change was consistent with a collective-bargaining agreement reached with an incumbent certified union and cannot be considered as evidence of intent to influence the outcome of the election. The Intervenor argues that there was a legitimate business reason for the change in the paycheck because the change was called for by the newly negotiated contract which provided for a wage increase retroactive to December 21, 1998. The Intervenor argues that the December 21, 1998 retroactive date was consistent with an earlier tentative agreement of the parties and also consistent with the consensus in the shop that the parties strive for an early conclusion to the negotiations.

There is no evidence in the record concerning the exact date the Employer would have been obligated to pay the first year increase in the event the bargaining unit employees ratified the tentative agreement. Similarly, there is no evidence that the date upon which the Employer would have to pay the first year increase was the subject of bargaining between the Intervenor and the Employer. Nor does the contract specify the date when the increase would actually be paid by the employer and received by the employees.

Applying the *Kalin* rule to the facts of the instant case, I find that there was no change in the time, location or method of distribution of the paycheck as the employees were paid on a normal payday, and their checks were given to them by their supervisors at their own work stations. The record shows, however, that within the proscribed period the Employer made a change in the paycheck itself, by including the 3-percent across-the-board increase in the paycheck on the day of the election. In my view, the Employer and Intervenor have not met their burden of demonstrating that there was a legitimate business reason for the timing of the change in the paycheck. Although I agree that the Employer and the Intervenor had an obligation to bargain under *RCA Del Caribe*, supra, it is evident to me that the change in the paycheck itself was motivated by the election. Thus, at the time that the Employer and the Intervenor negotiated a successor agreement, the existing agreement had not expired. Under that agreement, the employees' wages were locked in until at least February 11, 1999, the date when that existing contract expired. Despite this, the Employer and the Intervenor agreed to a wage increase retroactive to December 21, 1998, in the first year of the contract only. The increase for the second and third years was to be effective on February 11 in each of the 2 years. By the date that the Memorandum of

[4] See Employer's posthearing Br. at p. 8.

Understanding had been reached—January 5, 1999—the Employer and the Intervenor knew that an election was to be conducted on January 13, 1999, as they had signed a Stipulated Election Agreement. Accordingly, I reject the Employer's argument in its posthearing brief that it did not on December 21, 1998, know about the election when it agreed to a pay increase retroactive to December 21, 1998. As stated above, there was no agreement amongst the parties as to when the retroactive increase was to be paid. Thus, the contract did not require that the retroactive increase be paid on the election date. The only agreement was that the increase was to be retroactive to December 21, 1998. I am not persuaded by the Employer and Intervenor's argument that the Employer would have violated the January 5, 1999 Memorandum of Understanding if it had not paid the increase on the day of election. While the contract provided for a 3-percent increase to be "effective" on December 21, 1998, it did not require the employer to make this payment prior to the expiration of the existing contract on February 10, 1999. Thus, there is no compelling evidence that the payment of the increase itself could not have been delayed until that time. As the Employer has failed to offer an explanation as to why the payment of the increase could not have been delayed, it has not met its burden of showing that the timing of the paycheck change was for a legitimate business reason. *Trump Plaza Hotel & Casino*, 310 NLRB 1162, 1173 (1993), citing *William T. Burnett & Co*., 273 NLRB 1085, 1092 (1984). Accordingly, I find that the Employer violated the *Kalin* rule.